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# THE HIGH COURT OF SIKKIM : GANGTOK

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## *WRIT PETITION (C) NO. 4 OF 2004*

In the matter of an application under Article 227 of the Constitution of India.

and

in the matter of

1. Tulamaya Chettri
2. Nar Bahadur Chettri,
   Both residents of Jitlang Busty,
   P.O. & P.S. Rangpo,
   East Sikkim. **... Petitioners**

***VERSUS***

1. Younarayan Pradhan
2. Bhakta Bahadur Pradhan
3. Ben Prasad Pradhan
   All sons of Late Kulbir Pradhan,
   R/o Church Road,
   Gangtok, East Sikkim. **... Respondents**

For petitioners : Messrs A. K. Upadhyaya, Sudesh Joshi, S. Pradhan, Advocates.

For respondents : B. Sharma, Advocate.

***PRESENT : THE HON'BLE SHRI JUSTICE R.K. PATRA, CHIEF JUSTICE.***
***THE HON'B'LE SHRI JUSTICE N. SURJAMANI SINGH, JUDGE.***

***Date of order : 28th May, 2004.***

## O R D E R

***R.K. PATRA, C.J.***

The defendants in civil suit no. 30 of 2002 have filed this writ petition challenging the order dated 28.11.2003 of the learned trial Judge appointing an amin commissioner on the prayer made by the plaintiffs-respondents.

**2.** The respondents have filed the afore-mentioned suit asserting that they are the absolute owners of the land covered by plot no. 1998 (schedule 'A' land) situated at Jitlang Block, East Sikkim having been inherited the same from their ancestors. They have been possessing it for more than a century. In the year 1997 the petitioners started claiming a portion of it to be theirs on the allegation that the petitioner no. 1 purchased it from one Kalusingh Tamang but as a matter of fact the land alleged to have been purchased by him does not appertain to schedule 'A' land. The petitioners filed civil suit no. 60 of 1997 for declaration of title in respect of the said land and the suit was dismissed in June 2000. After dismissal of the suit, the petitioners encroached upon schedule 'B' land which is part and parcel of schedule 'A' land. This has given cause of action to the respondents to file the suit for the following reliefs:

(i) recovery of possession of schedule 'B' land by evicting the petitioners therefrom;

(ii) permanent injunction restraining the petitioners from encroaching upon schedule 'A' land or any portion thereof;

(iii) damages.

The petitioners as the defendants have filed their written statement. Their case is that petitioner no. 1

purchased land measuring 4.70 acres appertaining to plot no. 1065 (new survey plot no. 2001) under Central Pandam Block from Kalusingh Tamang in the year 1979 by way of registered sale deed and has been in possession of it as its absolute owner. The schedule 'B' land is that land which belongs to petitioner no. 1 in view of the aforesaid purchase in 1979. According to the petitioners, the respondents have laid a false claim over the schedule 'B' land out of sheer greed.

**3.** On the basis of the aforesaid pleadings of the parties, the trial Judge by order dated 1.10.2002 has framed the following three issues:-

(i) whether the plaintiffs or the defendant no. 1 is the absolute owner of schedule 'B' land;

(ii) whether the suit is barred by limitation;

(iii) to what relief the plaintiffs are entitled.

Thereafter both sides examined their witnesses and filed documents. After closure of their evidence, the matter was posted to 14.10.2003 for arguments. On that day the respondents filed a petition for appointment of an amin commissioner to "demarcate the whole area of the plaintiffs and the whole area of the defendants so that he could come to the finding whether the suit property is part and parcel of plot no. 1998 or not". It was stated in the petition that

appointment of amin commissioner is necessary because the case relates to encroachment and the Court has to come to a finding whether the schedule 'B' land forms part of plot no. 1998 or forms part of defendants' land. The petitioners filed objection contending that prayer for appointment of amin commissioner should not be allowed at the belated stage when both parties have already examined witnesses and closed their evidence. The learned trial Judge accepted the prayer for appointment of an amin commissioner by observing as follows:-

> "..... In the instant case though the parties have already closed their evidence and now it is in argument stage but when the controversy is as to identification, location or measurement/ demarcation of the land in question, such controversy can be resolved by conducting local investigation to get the proper identity of the land in dispute."

**4.** Order 26 Rule 9 CPC authorises the Court to appoint a commissioner if it considers a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or for other reasons mentioned therein. The matter is thus left to the discretion of the Court. The discretion is however a judicial one and not an arbitrary exercise of the power. The object of such appointment is to obtain evidence from the spot itself which helps the Court to properly understand and assess the evidence on record. The report submitted by the commissioner is a piece of evidence

which has to be considered along with other evidence on record. In Mahendranath Parida vs. Purnananda Parida AIR 1988 Orissa 248, Justice R. C. Patnaik (as he then was) pithily observed as follows:-

> "No doubt, the provision confers a discretion on the Court. But the discretion, as it is well known, has to be exercised in a judicious and sound manner but not whimsically and capriciously. What is necessary to note in the provision is the expression 'deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute.....' Therefore, where the Court considers a local investigation to be requisite and proper, ordinarily it should not decline to exercise jurisdiction. It may decline jurisdiction if the motion is made at a belated stage, or if the motion is mala fide or in circumstances justifying refusal. A party has choice and a right to examine a survey knowing person after getting the identification or measurement privately done by him. For examining such witness it does not seek any privilege or indulgence."
>
> [emphasis supplied]

Ordinarily we would not have interfered with an order appointing an amin commissioner but in the case at hand parties have closed their evidence and when the matter was at the stage of arguments the respondents came up with prayer for appointment of a commissioner. In view of the admitted fact that parties have already closed their evidence, acceding to the prayer for appointment of an amin commissioner at this belated stage would amount to permitting the respondents to fill up lacune in their evidence

thus leading to a roving inquiry. A learned single Judge of the Calcutta High Court in Satish Agarwal vs. Tirath Singh 1996 A I H C 1761 has held that when the matter awaits arguments, the prayer made by the defendants for local investigation, if allowed would amount to filling up lacune in their evidence and such prayer should not be allowed.

**5.** For the reasons aforesaid, the impugned order passed by the learned trial Judge cannot be sustained in law and is hereby set aside. He is directed to dispose of the suit by the end of June, 2004.

**6.** In the result, the writ petition is allowed. No order as to costs.

***( R. K. Patra )***
***Chief Justice***
***28.05.2004***

I agree.

***( N. Surjamani Singh )***
***Judge***
***28.05.2004***

Dictation taken
&
typed by me
Dipak Saha